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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 ROBERT EARLE JOHNSON,

9 Plaintiff,

v.

10 RICHARD L. MORGAN, et al.,

11 Defendants.

CASE NO. C16-5738 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION

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13 This matter comes before the Court on the Report and Recommendation (“R&R”)
14 of the Honorable Theresa L. Fricke, United States Magistrate Judge, Dkt. 149, Plaintiff
15 Robert Earle Johnson’s (“Johnson”) objections to the R&R, Dkt. 150, and Defendant
16 Forrest Mewes’s (“Mewes”) objections to the R&R, Dkt. 151.

17 On May 15, 2019, Judge Fricke issued the R&R recommending that the Court
18 deny Mewes’s motion for summary judgment on Johnson’s excessive force claim
19 because questions of fact remain for trial. Dkt. 149. On May 26, 2019, Johnson filed
20 objections. Dkt. 150. On May 29, 2019, Mewes filed objections. Dkt. 151.

21 The district judge must determine de novo any part of the magistrate judge’s
22 disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In this case, both parties filed objections to the R&R. Johnson objects to the R&R
4 seeking clarification of facts regarding whether Mewes only sprayed Johnson with pepper
5 spray or also sprayed two inmates that were allegedly fighting near Johnson. Dkt. 150.
6 The resolution of this factual dispute is unnecessary to the underlying merits of Mewes's
7 summary judgment motion. Johnson will have the opportunity to present all of the facts
8 in the subsequent trial.

9 Mewes objects to the R&R on the basis that Johnson does not allege a personal
10 excessive force claim and only alleges excessive force as an innocent bystander. Dkt.
11 151. The Court has already rejected this limited construction of Johnson's complaint,
12 Dkt. 105, and considers Mewes's objection preserved for appeal. Aside from this
13 objection, Mewes does not object to the substantive merits of the R&R regarding
14 Johnson's excessive force claim.

15 Finally, the parties shall meet and confer regarding a proposed pretrial and trial
16 schedule. Although the Court denied Johnson's motion to appoint counsel, that denial
17 was at an early stage of the proceedings. At the trial preparation stage, additional
18 complications arise that weigh in favor of the appointment of counsel. Johnson may
19 inform the Court whether he would like the Court to contact the Court's pro bono panel
20 of civil rights attorneys or other attorneys within the community to provide assistance for
21 trial preparation and trial.
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1 Therefore, the Court having considered the R&R, the parties' objections, and the
2 remaining record, does hereby find and order as follows:

- 3 (1) The R&R is **ADOPTED**;
- 4 (2) Mewes's motion for summary judgment, Dkt. 121, is **DENIED**;
- 5 (3) The parties shall meet and confer regarding a trial schedule and submit a
6 joint status report no later than August 1, 2019; and
- 7 (4) Johnson may file a motion or declaration seeking the appointment of
8 counsel.

9 Dated this 10th day of July, 2019.

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13 BENJAMIN H. SETTLE
14 United States District Judge
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